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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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ENVIR. APPEALS BOARD

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In the matter of: )  
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Deseret Power Electric Cooperative (Bonanza) ) PSD Appeal No. 07-03  
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PSD Permit Number OU-000204.00 )  
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**BRIEF OF AMICI CURIAE AMERICAN PETROLEUM INSTITUTE,  
AMERICAN CHEMISTRY COUNCIL, AMERICAN ROYALTY  
COUNCIL, CHAMBER OF COMMERCE OF THE UNITED  
STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND  
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION  
IN OPPOSITION TO PETITIONER'S OPENING BRIEF**

March 21, 2008

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## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	i
<b>TABLE OF AUTHORITIES</b> .....	ii
<b>PRELIMINARY STATEMENT</b> .....	1
<b>ARGUMENT</b> .....	2
<b>I. EPA Has Discretion to Interpret the PSD Requirements of the CAA, and the Board Should Defer to EPA’s Interpretations.</b> .....	2
A. EPA’s application of its PSD regulations to the Bonanza PSD permit is a permissible one. ....	4
B. Monitoring requirements for CO <sub>2</sub> do not make it a “regulated NSR pollutant.” .....	6
C. Monitoring requirements authorized by Section 821(a) of Pub. L. 101-549 do not constitute regulation under the Clean Air Act. ....	9
<b>II. Climate Change Concerns Should Be Addressed Through a Comprehensive Approach Rather than Through <i>Ad Hoc</i> Application of Ill-Suited Existing CAA Programs.</b> .....	11
<b>III. A Conclusion that PSD Applies Currently to CO<sub>2</sub> Emissions Would Create an Unworkable Situation for Regulators and Affected Sources.</b> ....	15
<b>CONCLUSION</b> .....	20
<b>EXHIBIT 1 Letter Brief Filed by State of New York, <i>et al.</i>, in <i>Connecticut v. American Electric Power</i></b>	

## TABLE OF AUTHORITIES

### CASES

<i>Alabama Power Co. v. Costle</i> , 606 F.2d 1068 (D.C. Cir. 1979) .....	11
<i>Baker v. Carr</i> , 369 U.S. 186 (1962) .....	14
<i>Capital Network Systems, Inc. v. FCC</i> , 28 F.3d 201 (D.C. Cir. 1994).....	4
<i>Ceds, Inc. v. EPA</i> , 745 F.2d 1092 (7 <sup>th</sup> Cir. 1984), <i>cert. denied</i> , 471 U.S. 1015 (1985) .....	8
<i>Envtl. Defense v. Duke Energy Corp.</i> , 127 S. Ct. 1423 (2007).....	11
<i>In re: Christian County Generation, LLC</i> , 13 E.A.D. ___, PSD Appeal No. 07-01 (Jan. 28, 2008) .....	6
<i>Intel Corp. v. Advanced Micro Devices, Inc.</i> , 541 U.S. 241 (2004) .....	11
<i>In re: Inter-Power of New York, Inc.</i> , 5 E.A.D. 130 (PSD Appeal Nos. 92-8 and 92-9) (March 16, 1994) .....	4
<i>Massachusetts v. EPA</i> , 127 S. Ct. 1438 (2007).....	4, 5, 6
<i>MCI Telecommunications Corp. v. AT&amp;T</i> , 512 U.S. 218 (1994) .....	8
<i>New York v. United States EPA</i> , 413 F.3d 3 (D.C. Cir. 2005), <i>rehearing denied</i> 431 F.3d 801 .....	11
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994) .....	4
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001). .....	9
<i>United States v. Tivian Laboratories, Inc.</i> , 589 F.2d 49 (1 <sup>st</sup> Cir. 1978), <i>cert. denied</i> , 442 U.S. 942 (1979) .....	8

### STATUTES

42 U.S.C. § 7411 .....	9
42 U.S.C. §§ 7470-79 .....	1
42 U.S.C. §§ 7475, 7479 .....	3
42 U.S.C. § 7475(a)(4) .....	3, 8
42 U.S.C. § 7521(a)(1) .....	5, 6
42 U.S.C. § 7607(b)(2).....	3, 17
42 U.S.C. 7651k(e) .....	11
Pub. L. 101-549 .....	7, 9, 10, 11

### FEDERAL REGULATIONS

40 C.F.R. § 60.40c(a) .....	18
-----------------------------	----

40 C.F.R. § 75.1 <i>et seq.</i> .....	7
40 C.F.R. § 124.19(a) .....	4
40 C.F.R. § 52.21(a)(2)(ii) .....	3
40 C.F.R. § 52.21(b)(1)(i) .....	17
40 C.F.R. § 52.21(b)(23)(ii) .....	15
40 C.F.R. § 52.21(b)(50) .....	3
40 C.F.R. § 52.21(j)(1) .....	16
40 C.F.R. § 52.21(j)(3) .....	3

**FEDERAL REGISTER NOTICE**

73 Fed. Reg. 12,156 (March 6, 2008) .....	12
---	----

## PRELIMINARY STATEMENT

*Amici curiae* American Petroleum Institute, American Chemistry Council, American Royalty Council, Chamber of Commerce of the United States of America, National Association of Manufacturers, National Oilseed Processors Association, and National Petrochemical & Refiners Association (“*amici*”) submit this brief in support of EPA and in response to the Board’s November 12, 2007 order granting Sierra Club’s petition and establishing a deadline for *amicus curiae* briefs responding to Sierra Club’s opening brief (as modified by the Board’s February 12, 2008 order). *Amici* are organizations that represent a broad spectrum of businesses that operate commercial and industrial facilities in the United States. *Amici* submit this brief in furtherance of the interests of business and industry in the reasonable, workable implementation of requirements for Prevention of Significant Deterioration (“PSD”) permitting under Title I Part C Subpart 1 of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7470-79.

In particular, *amici* want to ensure that the Board is aware of the severe problems that both regulatory agencies and the regulated community would face if Best Available Control Technology (“BACT”) and other PSD permitting requirements were imposed suddenly on emissions of carbon dioxide (“CO<sub>2</sub>”), as Sierra Club seeks to do through this case. Because of the way the PSD

permitting regulations are structured, and because CO<sub>2</sub> necessarily is emitted in much larger quantities than the air pollutants that thus far have been addressed in PSD permits, a conclusion that CO<sub>2</sub> emissions are already covered by the existing PSD regulations would cause a huge expansion of the number of sources and activities that would require PSD permits under the current rules. Permitting authorities lack the resources needed to process the vastly increased number of permit applications, and necessary projects, even at small businesses, would be delayed substantially and often precluded.

## ARGUMENT

### **I. EPA Has Discretion to Interpret the PSD Requirements of the CAA, and the Board Should Defer to EPA's Interpretations.**

Amici support the position of EPA and the permit applicant, that CO<sub>2</sub> does not fall within the category of “regulated NSR pollutants” for which a BACT determination is required. EPA has reasonably interpreted its regulations not to cover a pollutant, like CO<sub>2</sub>, that is not currently subject to any limitations on its emissions under the CAA.

Sierra Club claims that the PSD permit at issue in this case (the “Bonanza PSD Permit”) is defective because it does not include a BACT “emission limit for carbon dioxide.” Sierra Club Br. at 4; *id.* at 1. Under the PSD provisions of the CAA and EPA regulations, in order for a BACT requirement to apply, there

must first be a new major stationary source or a major modification of an existing stationary source. 42 U.S.C. §§ 7475, 7479; 40 C.F.R. § 52.21(a)(2)(ii). There is no question that the Bonanza PSD Permit addresses a modification that is “major” in terms of its emissions of pollutants other than CO<sub>2</sub>.

For there to be a requirement that the Bonanza PSD Permit include a BACT determination for the facility’s emissions of CO<sub>2</sub>, the CAA requires that CO<sub>2</sub> be a “pollutant subject to regulation under” the CAA. 42 U.S.C. § 7475(a)(4). EPA has implemented this requirement by specifying that BACT is required for a “significant” net increase in emissions of a “regulated NSR pollutant,” which EPA has defined in 40 C.F.R. § 52.21(b)(50). *See* 40 C.F.R. § 52.21(j)(3). That definition is somewhat circular, however, as “regulated NSR pollutants” include not only specific classes of air pollutants but also “any pollutant that otherwise is subject to regulation under the” CAA, except for listed hazardous air pollutants. 40 C.F.R. § 52.21(b)(50). (The validity of the PSD regulations themselves is not (and cannot be) at issue in this case, but only their application to the particular project addressed by the Bonanza PSD Permit. *See* 42 U.S.C. § 7607(b)(2).)

A. EPA's application of its PSD regulations to the Bonanza PSD permit is a permissible one.

EPA has interpreted its PSD regulations and determined that CO<sub>2</sub> does not meet the definition of a “regulated NSR pollutant” and therefore the Bonanza PSD Permit can be issued without a BACT determination for CO<sub>2</sub> emissions. EPA has substantial discretion to interpret its own regulations. In reviewing an agency’s understanding of its own regulations, a reviewing court’s “task is not to decide which among several competing interpretations best serves the regulatory purpose,” but rather to apply the agency’s interpretation “unless it is plainly erroneous or inconsistent with the regulation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also, e.g., Capital Network Systems, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994). The Board likewise has held, in the context of PSD permit appeals, that it will uphold the permit issuer’s judgment unless there has been a clear error of fact or law. *See, e.g., In re: Inter-Power of New York, Inc.*, 5 E.A.D. 130, 144 (PSD Appeal Nos. 92-8 and 92-9) (March 16, 1994), *citing* 40 C.F.R. § 124.19(a).

Nothing in the CAA or EPA’s PSD regulations compels a conclusion that EPA’s interpretation of the term “regulated NSR pollutant” to exclude CO<sub>2</sub> is plainly erroneous or inconsistent with the regulation. Assertions by Sierra Club (and the *amici curiae* supporting it) that the Supreme Court’s decision last year in *Massachusetts v. EPA*, 127 S. Ct. 1438, requires EPA to impose BACT limits

on CO<sub>2</sub> emissions or otherwise makes CO<sub>2</sub> a regulated NSR pollutant are unavailing. The Supreme Court in *Massachusetts* did not, as Petitioners imply, hold that EPA can or must regulate CO<sub>2</sub> and other greenhouse gas emissions under all or any of the various CAA sections that authorize EPA regulatory action. Rather, the Supreme Court's decision addresses only whether EPA has the authority—if specific statutory criteria are met—to regulate CO<sub>2</sub> and other greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Act, 42 U.S.C. § 7521(a)(1). *See* 127 S. Ct. at 1462 (“we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”); *id.* at 1459.<sup>1</sup>

Similarly, Sierra Club's assertion that the Supreme Court's determination that the CAA definition of “air pollutant” is broad enough to encompass CO<sub>2</sub> and other greenhouse gases means that EPA is required to apply BACT to CO<sub>2</sub> emissions is a huge overstatement of the effect of *Massachusetts v. EPA*. The

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<sup>1</sup> Indeed, even with respect to greenhouse gas emissions from motor vehicles, the Supreme Court did not hold that EPA was required, under section 202(a)(1) of the Act, to regulate such emissions or even to decide whether to regulate them. *See id.* at 1463 (“We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.”). Unless and until EPA controls CO<sub>2</sub> emissions from motor vehicles, following such an EPA finding, there is no regulation under the CAA of CO<sub>2</sub>, even in motor vehicle emissions.

Supreme Court did not construe the meaning of “air pollutant” in order to delineate the scope of regulatory authority under provisions of the Act other than section 202(a)(1); as noted above, the issue before the Court was “whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions *from new motor vehicles*,” 127 S. Ct. at 1459 (emphases added), not whether other CAA provisions authorize regulation of such emissions from other kinds of sources.<sup>2</sup> The Board itself also recently came to the conclusion that *Massachusetts v. EPA* alone does not resolve questions of PSD applicability and BACT. *See In re: Christian County Generation, LLC*, 13 E.A.D. \_\_\_, PSD Appeal No. 07-01 (Jan. 28, 2008), slip op. at 17 (“Here, the interpretation of federal law announced by the Supreme Court in its *Massachusetts* decision, standing alone, does not compel application of a CO<sub>2</sub> BACT limit in the present case.... Whether CO<sub>2</sub> is a pollutant subject to regulation under the Clean Air Act remains a matter of considerable dispute.”)

**B. Monitoring requirements for CO<sub>2</sub> do not make it a “regulated NSR pollutant.”**

Sierra Club and its *amici* argue that CO<sub>2</sub> is a pollutant “subject to

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<sup>2</sup> *See also Massachusetts v. EPA*, Petition for Writ of Certiorari, 2006 WL 558353 (U.S., March 2, 2006) (Questions Presented: “Whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under *section 202(a)(1)*.” (emphasis added)).

regulation under” the CAA (and therefore is a “regulated NSR pollutant”) because it is emitted by power plants and EPA has authority to require submission of information about CO<sub>2</sub> emissions. Under this formulation, virtually everything emitted into the air would be an air pollutant subject to regulation under the CAA and subject to BACT. Specifically, Sierra Club asserts that CO<sub>2</sub> “has been regulated under the Clean Air Act since 1993, when EPA adopted regulations implementing Section 821 [of Public Law 101-549, codified in 40 C.F.R. § 75.1 *et seq.*] that require monitoring, recordkeeping and recording of CO<sub>2</sub> emissions of certain covered sources.”<sup>3</sup>

EPA was entirely reasonable in concluding that the requirements in 40 C.F.R. § 75.1 *et seq.* for some sources to monitor and report their CO<sub>2</sub> emissions does not make CO<sub>2</sub> a “regulated NSR pollutant.” The common

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<sup>3</sup> Sierra Club Br. at 6 (citations omitted). Note that this is directly contrary to the position that *amici curiae* California, Connecticut, New York, Rhode Island, and Vermont took recently in a case before the U.S. Court of Appeals for the Second Circuit, *State of Connecticut et al. v. American Electric Power Co., Inc., et al.*, 2d Cir. No. 05-5104-cv. In a July 6, 2007 letter brief to the Second Circuit (attached as Exhibit 1), those states and others repeatedly and forcefully argued that EPA “has not exercised its power to regulate greenhouse gases pursuant to federal statute.” Exhibit 1 at 1 (emphasis added); *see also id.* at 2, 5 (speaking of “latent but as yet unexercised authority in EPA to regulate at least some types of greenhouse gases”), 6 (describing the CAA and existing EPA regulations as “heavy on potential, devoid of actual, regulation”), 7-10 (contrasting “Congress’ bare grant of broad authority under the Clean Air Act” with “a mere hope for future comprehensive federal regulation,” *id.* at 10).

meaning of “regulation” of pollutant emissions means a restriction or limitation on that pollutant, not simply a requirement to keep track of its emissions. To “regulate” is to “control, direct, or govern according to rule,” “to adjust to a particular standard, rate, degree, amount, etc.,” “to make uniform, methodical, orderly, etc.” *Webster’s New World Dictionary of the American Language*.

Monitoring emissions does not fit within any of the types of activities understood to constitute “regulation” of those emissions in the ordinary meaning of that term.<sup>4</sup> An agency’s interpretation of a statute should focus first on the ordinary, dictionary meaning of the terms used. *See, e.g., MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225-28 (1994).

In addition, if “subject to regulation under this Act” in CAA section 165(a)(4), 42 U.S.C. § 7475(a)(4), simply meant “subject to reporting requirements,” then that statutory phrase would not really represent any limitation at all. Section 114 of the CAA gives EPA very broad authority to collect information related to emissions of all air pollutants, including requiring emissions monitoring. *See United States v. Tivian Laboratories, Inc.*, 589 F.2d 49 (1<sup>st</sup> Cir. 1978), *cert. denied*, 442 U.S. 942 (1979); *see also Ceds, Inc. v. EPA*,

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<sup>4</sup> Sierra Club references definitions of “a regulation,” but the statute refers not to “a regulation” but to “regulation under.” *Cf.* Sierra Club Br. at 12-13. For that usage, it is the first meaning of “regulation” that is relevant: “a regulating or being regulated.”

745 F.2d 1092 (7<sup>th</sup> Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985). It is a fundamental rule that statutory language should not be interpreted so as to make portions of the language superfluous and of no effect. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). That would be the consequence, however, of interpreting “subject to regulation under this Act” as meaning nothing more than “subject to emissions monitoring under this Act,” which could encompass any air pollutant.<sup>5</sup>

C. Monitoring requirements authorized by Section 821(a) of Pub. L. 101-549 do not constitute regulation under the Clean Air Act.

Finally, EPA correctly determined that regulations requiring monitoring

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<sup>5</sup> Significantly, we are not aware of Sierra Club or others having argued, during the almost 30 years between enactment of the BACT requirement in the CAA Amendments of 1977 and their recent attempts to apply PSD to address climate change, that the “subject to regulation under this Act” language required BACT for all pollutants subject to monitoring (or, for that matter, to all pollutants subject to individual State Implementation Plans). The similar assertion of *amicus curiae* states that CO<sub>2</sub> is already “subject to regulation” under the New Source Performance Standards section of the CAA, section 111, 42 U.S.C. § 7411, suffers from similar over-inclusiveness. Moreover, CAA section 111 on its face does not require establishment of New Source Performance Standards for all air pollutants, or even all air pollutants whose emissions may reasonably be anticipated to endanger public health or welfare, as the state *amici* assert. *Cf.* CAA § 111(b)(1)(B) *with* § 111(f)(2). Nor has section 111 ever been interpreted that way. In addition, many of the same states took a contradictory position in a case before the Second Circuit, arguing that it is uncertain whether EPA will invoke its authority under the CAA and set New Source Performance Standards for greenhouse gases and that “[v]arious potential legal bars to the applicability of Section 111’s requirements to new or modified stationary sources of greenhouse gases...still are being litigated.” Exhibit 1 at 6.

and reporting of CO<sub>2</sub> emissions that were authorized by Section 821(a) of the Clean Air Act Amendments of 1990, Pub. L. 101-549, do not constitute “regulation under” the CAA in any event. While Sierra Club and its *amici* scoff at the notion that the authority to require monitoring and reporting of CO<sub>2</sub> emissions is not part of the Clean Air Act, that fact is apparent on the face of the statute, and there is no need to refer to legislative history or other clues that Sierra Club relies on. Public Law 101-549, the Clean Air Act Amendments of 1990, does not constitute the Clean Air Act: it contains amendments to the Clean Air Act. It also contains provisions, however, that are not amendments to the CAA, including Section 821(a) of Pub. L. 101-549 (which authorizes EPA to issue regulations requiring monitoring and reporting of CO<sub>2</sub> emissions). Title VII of Pub. L. 101-549, “Miscellaneous Provisions,” contains some sections that specifically state that they amend the CAA, and others, such as Section 821, that do not contain any amendatory language and do not add new sections to the CAA or repeal existing ones. *Compare, e.g.*, Pub. L. 101-549 sections 801, 803, 812, 816, 822 (101 Stat. 2685, 2689, 2691, 2695, 2699) *with* sections 808, 811, 815, 820, 821 (101 Stat. 2690, 2693, 2699). Nothing Sierra Club or *amici* have said or can say contradicts the plain language of Pub. L. 101-549: Section 821 did not amend, and therefore does not authorize

“regulation under,” the Clean Air Act.<sup>6</sup>

EPA has substantial flexibility in interpreting the PSD provisions of the CAA. *See, e.g., New York v. United States EPA*, 413 F.3d 3, 23-24 (D.C. Cir. 2005), *rehearing denied* 431 F.3d 801. *Alabama Power Co. v. Costle*, 606 F.2d 1068, 1077 (D.C. Cir. 1979) (describing the “flexibility” and “latitude” EPA has in fashioning PSD regulations); *Env'tl. Defense. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007) (legislative history does not suggest Congress “had details of regulatory implementation in mind when it imposed PSD requirements on modified sources”). EPA’s interpretation was reasonable and consistent with the statutory language, for the reasons set forth above, and therefore must be upheld.

## **II. Climate Change Concerns Should Be Addressed Through a Comprehensive Approach Rather than Through *Ad Hoc* Application of Ill-Suited Existing CAA Programs.**

A number of the *amicus curiae* briefs supporting Sierra Club focus on

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<sup>6</sup> Sierra Club asserts that monitoring and reporting requirements issued under section 821 are enforceable under section 412 of the CAA, citing as authority 42 U.S.C. 7651k(e). But neither that section of the CAA nor section 821 of Pub. L. 101-549 says that, *see* 101 Stat. 2699, and in any event that would not convert section 821 of Pub. L. 101-549 into a provision of the CAA. Nor does the short title of Pub. L. 101-549 (The Clean Air Act Amendments of 1990) supersede the language of the statute itself, converting provisions which by their terms do not amend the Clean Air Act into provisions of the Clean Air Act. *See, e.g., Intel Corp. v. Advanced Micro Devices, Inc.*, 541 U.S. 241, 256 (2004) (the caption of a statute cannot undo or limit what the statute’s text makes clear).

potential adverse effects of climate change and express an urgent need to reduce emissions of CO<sub>2</sub> and other greenhouse gases. But even if the most dire predictions were accurate, the way to address the concerns is not through *ad hoc* application of the PSD program, especially in the context of an appeal of an individual PSD permit.

Sierra Club and its supporting *amici* in effect want to create a regulatory program for CO<sub>2</sub> comparable to the nonattainment new source review provisions of the CAA—a ban on increases in CO<sub>2</sub>, requiring emission offsets, and the like—in furtherance of a goal of improving global CO<sub>2</sub> concentrations. But since nonattainment new source review obviously is inapplicable here, as there is no national ambient air quality standard for CO<sub>2</sub>, they seek instead to impose selected requirements of the PSD program, even though the goals and mechanisms of the PSD program do not “fit.” Without an ambient air quality standard or designated “increments” for CO<sub>2</sub> (which in any event would not be appropriate for greenhouse gases, for reasons summarized briefly in the following paragraph), the monitoring, modeling, and analysis provisions of the PSD regulations—designed to assure that the ambient standard will continue to be met and that ambient concentrations in the area affected by the new or modified source will not increase significantly—have no application.

In fact, the whole nature of the concern about climate change relates to

CO<sub>2</sub> concentrations in the global atmosphere, not to the impact of a particular source in a particular area. *See, e.g.*, Decision of the Administrator denying California CAA waiver request for its motor vehicle greenhouse gas emissions standards, 73 Fed. Reg. 12,156, 12,160 (March 6, 2008) (describing issues concerning evaluation of potential changes in the atmospheric concentration of CO<sub>2</sub> and its effect on climate “[i]n contrast to local or regional air pollution problems”; “The factors looked at in the past—...which were considered the fundamental causes of the air pollution levels found in California—no longer perform the same causal function.”); *id* at 12,161 (referring to “the different, and global, nature of the pollution at issue”).

Sierra Club focuses on application of a single aspect of the PSD program, the requirement to apply BACT to new and increased emissions. But since Sierra Club’s goal presumably is reducing overall global atmospheric loading of CO<sub>2</sub> rather than minimizing the impact of a particular source in a particular area, there is no reason to think that applying a “top-down” BACT process to impose stringent emission limitations on those sources that happen to be modified is the most efficient or effective means of obtaining global or even national reductions in total CO<sub>2</sub> loading.<sup>7</sup>

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<sup>7</sup> Nor are BACT limitations necessary, as *amicus* National Parks Conservation Association asserts, for the Federal Land Manager to be able to consider impacts  
(continued...)

Virtually all observers recognize that stabilizing and reducing atmospheric concentrations of CO<sub>2</sub> would impose huge societal costs and require an international effort. Climate change should be addressed in a comprehensive fashion through the legislative and rulemaking processes, rather than trying to shoehorn climate change concerns into existing authorities, such as the issuance of source-specific PSD permits, that are neither designed to address that type of concern nor likely to represent an effective and efficient approach for doing so. It would be especially inappropriate for the Board to undertake to make climate change mitigation policy in the context of an appeal of an individual PSD permit. Even Sierra Club and their *amici* have effectively acknowledged that these important issues need to be addressed through a national policy discussion “appropriate to a regulatory decision of this magnitude,” rather than in an *ad hoc* manner without the benefit of a rulemaking. *See, e.g.*, Sierra Club Br. at 3, 4. These far-reaching policy issues “uniquely demand a single-voiced statement of the Government’s views,” not piecemeal policy development through adjudications. *See Baker v. Carr*, 369

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of greenhouse gas emissions from new and modified sources on Class I areas. If indeed it is appropriate for the Federal Land Manager to engage in such an exercise, which is not at all clear, there is no reason that he could not base such an analysis on the anticipated uncontrolled emission rate of greenhouse gases, rather than basing it on an assumption that greenhouse gases will be emitted at a BACT-based emission rate.

U.S. 186, 211 (1962).

**III. A Conclusion that PSD Applies Currently to CO<sub>2</sub> Emissions Would Create an Unworkable Situation for Regulators and Affected Sources.**

As noted above, for BACT emission limits to be imposed on CO<sub>2</sub> emissions as part of the Bonanza PSD Permit, those CO<sub>2</sub> emissions would have to be determined to represent a “significant net emissions increase” of a “regulated NSR pollutant.” If the Board were to determine that CO<sub>2</sub> meets the definition of “regulated NSR pollutant” (despite the demonstration in Part I, *supra*, that it does not) then under 40 C.F.R. § 52.21(b)(23)(ii) any increase in CO<sub>2</sub> emissions would be considered a “significant” increase. That regulation does not establish any numerical significance level for CO<sub>2</sub>, as it does for many other pollutants, so by the terms of the PSD regulations “any emission rate” is “significant.”

Under this interpretation, a slight physical change or change in the method of operation of a facility that affects its fuel burning rate or otherwise produces a CO<sub>2</sub> increase could require the facility to obtain a preconstruction PSD permit. Suddenly many thousands of commonplace activities that might involve a slight change in fossil fuel consumption would have to be analyzed for possible PSD applicability as a “major modification,” and businesses would

be faced with a requirement to obtain a PSD permit prior to commencing far more activities than up to now.

This would create a huge strain on the resources of PSD permitting authorities, which would have to process many more PSD permit applications. Moreover, dealing with those applications would be particularly resource-intensive because there is no history of BACT determinations for CO<sub>2</sub> and no EPA guidance on the subject. Important touchstones of a BACT determination, State Implementation Plan emission limits and national New Source Performance Standards (*see* 40 C.F.R. § 52.21(j)(1)), do not exist for CO<sub>2</sub>.<sup>8</sup> Thus, each permit would require a one-time BACT determination, essentially from scratch, requiring large amounts of permit writers' time and increasing the likelihood of lengthy appeals.

The implications of treating CO<sub>2</sub> as a "regulated NSR pollutant" would be even more far-reaching, however, in light of the effect that would have on the designation of "major stationary sources." EPA has interpreted the statutory thresholds for determining whether a facility is a "major stationary source" (100

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<sup>8</sup> Although a few states, such as Montana, have imposed limits on future emissions of CO<sub>2</sub> from certain types of sources, those are arbitrary mandates, intended to be technology-forcing, rather than determinations of the effectiveness, in light of cost, energy impacts, and the like, of available technologies that would provide useful precedent for a BACT determination.

tons per year (tpy) for facilities in certain categories and 250 tpy for all other facilities) to apply to emissions of a “regulated NSR pollutant.” See 40 C.F.R. § 52.21(b)(1)(i)). That is a reasonable interpretation, and in any event it must be followed for purposes of this permit appeal. See 42 U.S.C. § 7607(b)(2). If the term “regulated NSR pollutant” includes CO<sub>2</sub>, which is emitted from fuel-burning sources in far larger quantities than regulated pollutants like SO<sub>2</sub> and NO<sub>x</sub>, then far more facilities would be considered “major stationary sources.”

For example, burning natural gas typically generates about 120.6 pounds of CO<sub>2</sub> per thousand cubic feet (mcf) of natural gas consumed.<sup>9</sup> This means that a source would only need to burn about 1660 mcf of natural gas per year to exceed 100 tons of CO<sub>2</sub> emitted per year, or about 4150 mcf to exceed 250 tpy. According to the U.S. Department of Energy, a facility with floor space of 100,000 square feet or more or employing 100 workers or more might well exceed 250 tpy of actual CO<sub>2</sub> emissions *just from space heating*.<sup>10</sup> This means that thousands of medium and large warehouses, medium-size office buildings, and large hotels and other buildings would emit enough CO<sub>2</sub> to be treated as a

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<sup>9</sup> Source: U.S. Dept. of Energy, <http://www.eia.doe.gov/oiaf/1605/coefficients.html>.

<sup>10</sup> Source, U.S. Dept. of Energy, <http://www.eia.doe.gov/emeu/consumption/index.html>, Table C24.

“major stationary source” and subject to PSD permitting. Using a typical emission rate of 117 pounds of CO<sub>2</sub> per million Btu (MMBtu) heat input from burning natural gas,<sup>11</sup> a facility operating a boiler as small as 0.5 MMBtu/hr. for 24 hours a day would exceed 250 tpy of CO<sub>2</sub> emissions. (By comparison, EPA New Source Performance Standards for “Small Industrial-Commercial-Institutional Steam Generating Units” apply to units between 10 and 100 MMBtu/hr. 40 C.F.R. § 60.40c(a).) In fact, it is not an exaggeration to say that even fast food establishments could cross the 250 tpy of CO<sub>2</sub> emissions “major source” threshold.<sup>12</sup> (Note that these annual projected CO<sub>2</sub> emissions represent actual emissions for these facilities. If potential to emit at maximum capacity and constant operation were used to determine PSD applicability, as EPA rules and practice often require, even *smaller* sources could be affected. Those sources might need to obtain a state air permit, otherwise not required by state regulations, in order to have a “federally enforceable” limit on their operations to be able to demonstrate that their “potential to emit” CO<sub>2</sub> is under 250 tpy.

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<sup>11</sup> Source: n. 9, *supra*.

<sup>12</sup> Just a single 60” wide Garland Sunfire commercial range with 10 burners and two ovens has a heat input of 0.34 MMBtu/hr., and a Commercial Range Company 25/25 lb. split-tank deep fryer uses 0.14 MMBtu/hr.; thus, a restaurant with two 60” ranges and one deep fryer operating 7 am to 10 pm could exceed 250 tpy of actual CO<sub>2</sub> emissions.

This would pose an even further burden on state permit authorities and small businesses.)

Thus, if a “regulated NSR pollutant” could be defined through this PSD permit appeal to include CO<sub>2</sub>, that determination would vastly increase the number of facilities that would need to obtain a PSD permit before they were constructed or before they were modified (which, as noted above, under current PSD regulations would mean a non-exempt change causing any increase in CO<sub>2</sub> emissions). Large numbers of facilities that until now have not been covered by any CAA permitting requirement would have to analyze their operations and would have to delay non-exempt changes until PSD permits could be obtained—a process which, even under existing permitting workloads, frequently takes a year or longer. The regulatory authorities would be overwhelmed by the huge increase in facilities subject to PSD permitting requirements, and regulatory gridlock would result.<sup>13</sup> Even projects that would

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<sup>13</sup> While EPA might be able to mitigate some of these adverse impacts by amending its PSD regulations to create additional de minimis exclusions or to specify a higher “significance” level for increases of CO<sub>2</sub>, (a) the 100/250 tpy thresholds for major stationary source are in the CAA itself, and (b) any EPA rulemaking would be a lengthy process, during which the regulatory gridlock of applying the existing PSD regulations to the much higher levels of CO<sub>2</sub> emissions would continue unabated.

have the effect of increasing energy efficiency and reducing overall CO<sub>2</sub> emissions could be delayed indefinitely.

Clearly, application of the PSD program to CO<sub>2</sub> emissions would be a huge regulatory change that should be imposed only through comprehensive rulemaking (and, likely, legislation). The Board should not engage in the kind of regulation by litigation that Sierra Club and the *amici* supporting it seek. A decision by the Board that PSD permitting regulations already apply to CO<sub>2</sub> emissions is not the way to address such important policy matters.

### CONCLUSION

For the reasons set forth above, *amici* urge the Board to deny the Sierra Club petition for review and uphold EPA's issuance of the Bonanza PSD Permit.

Respectfully submitted,



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# EXHIBIT 1



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
ATTORNEY GENERAL

July 6, 2007

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Catherine O'Hagan Wolfe  
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Re: State of Connecticut, et al. v. American Electric Power Company, Inc., et al.  
(05-5104-cv)

Dear Ms. Wolfe:

Pursuant to this Court's order dated June 21, 2007, the Plaintiffs<sup>1</sup> in the above-captioned case submit this letter to advise the Court of their views of the impact of Massachusetts v. EPA, 127 S. Ct. 1438 (Apr. 2, 2007), on the question whether the Clean Air Act displaces Plaintiffs' federal common law interstate nuisance claim.<sup>2</sup>

In this action, the Plaintiff-States seek to abate out-of-state greenhouse gas emissions. Each invokes its federal common law right to make a "fair and reasonable demand" on the federal government that the air over its territory, the forests on its mountains, and its irreplaceable ecological resources "should not be further destroyed by persons beyond its control." Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). The Supreme Court acknowledges that "[t]he harms associated with climate change are serious and well recognized." Massachusetts, 127 S. Ct. at 1455. To date, however, the EPA has not exercised its power to regulate greenhouse gases pursuant to federal statute.

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<sup>1</sup> "Plaintiff-States" or "Plaintiffs" refers to Plaintiffs-Appellants States of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, and the City of New York.

<sup>2</sup> The Massachusetts decision disposes of Defendants' arguments that Plaintiffs lack standing and that Executive power is exclusive in shaping domestic regulation of greenhouse gases. We have previously addressed these issues in our April 10, 2007, Rule 28(j) letter, and, therefore, will focus in this letter brief exclusively on displacement of federal common law (also referred to in the case law as "preemption").

Massachusetts does not change this state of affairs. In addressing EPA's authority to apply the Clean Air Act's mobile source provisions to greenhouse gases, the Court rejected EPA's contention that greenhouse gases are not "air pollutant[s]," id. at 1460, and various "policy" reasons for inaction, id. at 1462-63. The Court then remanded to EPA with instructions to "ground its reasons for action or inaction in the statute." Id. at 1463. The question, then, is whether the mere potential that EPA may at some time in the future, in some unknown way, regulate greenhouse gases under the Clean Air Act serves today to displace the Plaintiffs' interstate nuisance claims.

As this letter brief explains, the answer is "no." The potential for federal regulation of greenhouse gases under the Clean Air Act is closely analogous to the potential for federal regulation of water pollution under federal statutes at the time of Illinois v. Milwaukee, 406 U.S. 91 (1971) ("Milwaukee I"). Those statutes broadly authorized federal agencies to enact comprehensive regulatory standards to address water pollution. Yet, as this Court is aware, the Milwaukee I Court found no displacement of the States' interstate common law rights by the then-bare grants of authority to regulate, in the absence of actual regulation. The federal common law was displaced only after Congress had thoroughly overhauled the statute, providing that discharges to water without permits are illegal, requiring a comprehensive permitting scheme, and permitting the States to protect their quasi-sovereign interests through challenges to out-of-state polluters' permits, and only after EPA and the States had actually implemented the permitting scheme. Milwaukee v. Illinois, 451 U.S. 304, 317-20, 325-26 (1981) ("Milwaukee II"). In contrast to the water pollution statutes at issue in Milwaukee II, as relevant here, the Clean Air Act itself does not set standards for emissions of any air pollutants, including greenhouse gases, in the absence of national ambient air quality standards ("NAAQS") and other implementing regulations, and EPA's latent but unexercised power to promulgate such implementing regulations does not suffice to displace the States' interstate common law remedies.

"It may happen that new federal laws and new federal regulations may in time" address the problem of the Plaintiff-States' injuries from greenhouse gas emissions. Milwaukee I, 406 U.S. at 107. "But until that time comes to pass, federal courts will be empowered to appraise the equities of . . . suits alleging . . . nuisance" by emissions of greenhouse gases. Id.

#### **Statutory Background**

The Court in Massachusetts held that greenhouse gases fall within the Clean Air Act's "sweeping definition of 'air pollutant.'" 127 S.Ct. at 1460 (citing 42 U.S.C. § 7602(g)). An understanding of the potential relevance of this holding requires an understanding of the provisions of the Act that depend on a substance being an "air pollutant." The Clean Air Act authorizes EPA to adopt certain types of regulations concerning greenhouse gas emissions, as air pollutants, if it finds that the emissions might "endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (regulation of mobile sources); 42 U.S.C. § 7411(b), (d) (new source performance standards).

Section 202 of the Act provides that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Under Section 111, dealing with new source performance standards ("NSPS"), EPA must list each category of stationary sources that in the Administrator's judgment "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" and "establish[] Federal standards of performance for new sources within such category." 42 U.S.C. § 7411(b)(1)(A), (B). The statute further requires that the Administrator, "at least every 8 years, review and, if appropriate, revise such standards . . ." *Id.* § 7411(b)(1)(B). At present, there are no standards of performance under Section 111 for carbon dioxide from power plants.

Apart from the mobile source and NSPS provisions, EPA has authority to promulgate NAAQS for "air pollutant[s]" that meet requirements set forth in Sections 108 and 109 of the Act. *See* 42 U.S.C. §§ 7408, 7409. For air pollutants covered by NAAQS, a broader range of regulatory mechanisms come into play. *See, e.g.*, 42 U.S.C. §§ 7470-7492 (prevention of significant deterioration); *id.* §§ 7501-7515 (nonattainment). There are no provisions affording States a remedy for harms from interstate air pollution, except for harms from pollutants for which NAAQS already have been promulgated. *See, e.g.*, 42 U.S.C. § 7410(a)(2)(D) (requiring States to prohibit emissions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [NAAQS]"); *id.* § 7426 (procedure for States to be notified of and petition for relief from out-of-state emissions contributing to nonattainment of NAAQS). There are no NAAQS for carbon dioxide or other greenhouse gases.

### Argument

The dispositive principles here are well-established. "[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks omitted). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (quoting *Milwaukee II*, 451 U.S. at 315).

Nothing in the Clean Air Act suggests that Congress intended to, or did, displace the long-standing federal common law right of the States to federal abatement of out-of-state contributions to in-state injuries from greenhouse gases. Absent the creation of a comprehensive regulatory scheme to address greenhouse gases, and a regulatory process to provide a remedy to the States for harms related to greenhouse gas emissions, the Act does not "speak directly" to the States' injuries, and the States must continue to have recourse to the federal common law.

#### **A. Unless displaced, federal common law governs the States' injuries from interstate air pollution.**

Throughout the Nation's history, as new strains on the States' natural resources have

emerged and conflicts between the citizens of different States over those resources have arisen, the federal judiciary has resolved those disputes under a well-established enclave of federal common law, "interstate common law." See Brief for Plaintiffs-Appellants ("Pl. Br.") at 3-7, 47-50. Federal common law has been applied for two reasons. First, the Supreme Court repeatedly has recognized that the States' right to a federal remedy for injuries to their quasi-sovereign interests was a condition of the States' joining the Union. See Pl. Br. at 4-6, 23-25, 47-50; Reply Brief for Plaintiffs-Appellants ("Pl. Reply") at 6-7; Tennessee Copper, 206 U.S. at 237. The Supreme Court, in Massachusetts, confirmed this implicit constitutional deal. See 127 S. Ct. at 1454.<sup>3</sup> Second, the Court has recognized that, in such disputes, it would be inappropriate to apply the laws of one of the interested States. See West Virginia ex rel Dyer, 341 U.S. 22, 28 (1951) ("[a] State cannot be its own ultimate judge").

**B. There can be no displacement unless and until Congress or agency regulations authorized by Congress speak directly to the particular issue otherwise answered by federal common law.**

Courts begin evaluation of displacement with the presumption that Congress intends to retain background federal common law because federal common law is used in areas, such as the interstate controversy here, where the general police powers and common law of individual States cannot supply a rule of decision. See Milwaukee II, 451 U.S. at 313 n.7; Plaintiffs'-Appellants' Brief ("Pl. Br.") at 48-49; see also Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) (noting that Congress has never enacted a comprehensive maritime statute, assuming that federal common law will continue to provide legal answers in many maritime disputes).

Because displacement of federal common law could create a legal void, the Supreme Court has warned that federal common law is a "necessary expedient" when Congress has not "spoken to a particular issue," and has held that courts should not find displacement unless Congress "[speaks] directly to [the] question" otherwise answered by federal common law." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 237 (1985) (emphasis and brackets in original) (quoting Milwaukee II, 451 U.S. at 313-314, 315).

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<sup>3</sup>As the Supreme Court noted, "States are not normal litigants for the purposes of invoking federal jurisdiction." Massachusetts, 127 S. Ct. at 1454 (citing Tennessee Copper, 206 U.S. at 237). When the States entered the Union, they surrendered their sovereign prerogatives to invade other states by force to abate nuisances. Id. But the States did not surrender their quasi-sovereign right to seek and obtain relief for the same. Id.; see also Tennessee Copper, 206 U.S. at 237. Since the "sovereign prerogatives" are now lodged in the federal government, States must now turn to the federal government for relief: either to a federal agency, where that agency has authorized regulations and procedures in place and a remedy to offer, or directly to the federal courts exercising their powers under the federal common law. Massachusetts, 127 S. Ct. at 1454; Tennessee Copper, 206 U.S. at 237. Where, as here, EPA has yet to act to protect the States, federal courts must continue to exercise their long-standing authority in this area.

**C. Where a State's quasi-sovereign right to protection of its natural resources from out-of-state harm is at issue, there is no displacement without an adequate remedy.**

The presumption that Congress intends to preserve existing federal common law has particular force where, as here, it serves to protect a State's right, retained when joining the Union, to demand that its natural resources "should not be further destroyed or threatened by the act of persons beyond its control." Tennessee Copper, 206 U.S. at 238; see also Milwaukee I, 406 U.S. at 100 (referring to "ecological rights of a State"). To displace the States' federal common law nuisance rights and remedies, Congress must speak to the particular issue by providing an adequate substitute statutory or regulatory remedy.

The Supreme Court has recognized that the Federal Government -- whether the Judiciary or Congress -- has a duty to provide a remedy for injuries to quasi-sovereign interests from out-of-state sources. Referring to Congress' inability to resolve interstate controversies under the Articles of Confederation (see Pl. Br. at 4-5; Pl. Reply at 6-7), the Court explained:

"All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do, settle the controversies between them."

Kansas v. Colorado, 206 U.S. 46, 84 (1907) (quoting Rhode Island v. Massachusetts, 37 U.S. 657, 743 (1838)) (emphasis added).

The judiciary has a duty to assure an adequate remedy even where Congress has created some mechanism for resolving a dispute. In Milwaukee II, in holding that the 1972 amendments to the FWPCA were sufficient to displace federal common law, the Court emphasized that the amendments provided "ample opportunity" for States to challenge pollution from other States. 451 U.S. at 326. The Court explained that "one of the major concerns underlying the recognition of federal common law in [Milwaukee I] was] . . . that Illinois did not have any forum in which to protect its interests unless federal common law were created," 451 U.S. at 325, and that "the legislation considered in [Milwaukee I]" was "inadequate," id. at 325 n.18 (emphasis added). It cited Congress' own view that "previous legislation was inadequate in every vital aspect." Id. at 318 n.10 (internal quotation marks omitted); see also Texas v. New Mexico, 462 U.S. 554, 569-70 (1983) (holding that interstate water compact did not preclude judicial relief where it did not provide an "equivalent" method of vindicating State's rights.)

**D. The Clean Air Act's mere potential for future greenhouse gas regulations does not speak directly to the States' right to a remedy for injuries from interstate emissions.**

The Clean Air Act creates latent but as yet unexercised authority in EPA to regulate at least some types of greenhouse gas sources. Until EPA actually invokes this authority to regulate, the Act does not "directly address" the Plaintiff-States' injuries from out-of-state greenhouse gas emissions. Based on EPA's statements, it is uncertain when or whether EPA will

invoke its authority under the Act to apply any regulatory mechanisms to any greenhouse gas emissions, including the mobile source emissions that were the subject of Massachusetts. See Darren Samuelson, "Supreme Court Offers Significant Latitude on GHG Rules" – EPA Chief, Greenwire (Apr. 24, 2007) (reporting EPA Administrator's testimony that Massachusetts left EPA with "significant latitude" to determine whether new rules are needed). Various potential legal bars to the applicability of Section 111's requirements to new or modified stationary sources of greenhouse gases – the potential subject of NSPS regulations, see supra at 2-3 – still are being litigated. See Standards of Performance for Electric Utility Steam Generating Units, 71 Fed. Reg. 9866, 9869 (Feb. 27, 2006) (declining to apply NSPS to greenhouse gases); State of New York v. EPA, No. 06-1322 (D.C. Cir. filed Apr. 27, 2006) (challenge to EPA's decision). And, most directly to the point, there is no indication that EPA is considering promulgating NAAQS for greenhouse gases, a necessary predicate for one State to challenge the adequacy of another State's emissions controls under the Act.

At this time, the Act and existing implementing regulations, in short, are heavy on potential, devoid of actual, regulation. The Clean Air Act thus is closely analogous to federal water pollution legislation at the time of Milwaukee I, even to the extent that both statutes authorize (or authorized) regulation based on a finding that particular pollutants endanger health or welfare. The similarities compel the conclusion that, just as there was no displacement in Milwaukee I, there is no displacement here.

The Federal Water Pollution Control Act ("FWPCA") in place at the time of Milwaukee I included a general grant of authority to EPA: "[t]he Administrator shall . . . prepare or develop comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries thereof and improving the sanitary condition of surface and underground waters." 33 U.S.C. § 1153 (1970).<sup>4</sup> More specifically, it provided that "[t]he pollution of interstate or navigable waters in or adjacent to any State or States . . . which endangers the health or welfare of any persons [] shall be subject to abatement as provided in this chapter." 33 U.S.C. § 1160(a) (1970) (emphasis added). It contemplated that the States, subject to EPA approval, would adopt "water quality criteria applicable to interstate waters or portions thereof within such state and . . . a plan for the implementation and enforcement of the water quality criteria adopted." See 33 U.S.C. § 1160(c)(1) (1970). If a State did not promulgate adequate criteria, EPA, after notice-and-comment, was authorized to prepare its own water quality criteria. See 33 U.S.C. § 1160(c)(2) (1970). If a State failed to adopt EPA's criteria, the FWPCA required EPA to "promulgate such standards" itself. 33 U.S.C. § 1160(c)(2) (1970).

Once such criteria were promulgated, EPA could seek abatement of pollution. After convening interested parties to seek a voluntary resolution, "[i]f the Administrator believes, upon

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<sup>4</sup> For the Court's convenience, a copy of the pre-Milwaukee I FWPCA, 33 U.S.C. §§1151-1175 (1970), is attached to this letter. Other federal water pollution laws on the books in 1971, for example, the Rivers and Harbors Act of 1899, were similarly broad. See Milwaukee I, 406 U.S. at 101; United States v. Standard Oil Co., 384 U.S. 224 (1966).

Catherine O'Hagan Wolfe

July 6, 2007

Page 7

conclusion of the conference or thereafter, that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered he shall recommend to the appropriate State water pollution control agency that it take necessary remedial action." 33 U.S.C. § 1160(e) (1970) (emphasis added). At the conclusion of a six-month waiting period, if "such remedial action has not been taken or action which in the judgment of the Administrator is reasonably calculated to secure abatement of such pollution has not been taken, the Administrator shall call a public hearing . . . ." 33 U.S.C. § 1160(f)(1) (1970). At the conclusion of the public hearing the Administrator was required to send findings concerning pollution to the person or persons contributing to such pollution. 33 U.S.C. § 1160(f)(1) (1970). Finally, other actions failing, EPA could request that the Attorney General bring suit to secure abatement of interstate water pollution "which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges . . . originate . . ." 33 U.S.C. § 1160(g)(1) (1970) (emphasis added).

The statutory provisions in place at the time of Milwaukee I are remarkably similar to the general grants of authority to EPA under the current Clean Air Act. Under the pre-Milwaukee I water pollution legislation, EPA could take action to abate discharges that it found endangered health or welfare. Similarly, under the Clean Air Act, EPA could regulate some greenhouse gas emissions sources if the agency were to find that they endanger health and welfare.

The kind of pollution legislation and regulation that is sufficient to displace federal common law is illustrated by the later amendments to the FWPCA at issue in Milwaukee II. The Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, by contrast to the pre-Milwaukee I law, actually addressed the rights and duties of the parties of Illinois and Milwaukee in their dispute over interstate sewage. See Pl. Br. at 61-63. It did not, as the earlier FWPCA and the current Clean Air Act do, merely provide a grant of authority by which an agency might through some future regulation address the rights of States to redress for interstate pollution.

As Milwaukee II recounts, Congress explicitly decided the legality of water pollution discharges: the amendments made it "illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." 451 U.S. at 310-11 (citing 33 U.S.C. §§ 1311(a), 1342). By the time of Milwaukee II, EPA had "promulgated regulations establishing specific effluent limitations," which were "incorporated as conditions" of all permits to be issued under the FWPCA. Id. at 311. Furthermore, a permit system already was in place and, in fact, the discharges actually at issue in the dispute between Illinois and Milwaukee were subject to statutorily-required permits and in fact had been subject to statutory enforcement actions. Id. Finally, the amended FWPCA contained explicit provisions authorizing States to challenge water pollution from other States. Id. at 325-26 (reviewing provisions for resolution of interstate disputes). Based on (a) the actual standard directly enacted by Congress (discharges are presumptively illegal), (b) the actual regulatory scheme that decided when that presumption was overcome, and (c) the provisions governing disputes about injuries to one State from discharges in another, the Milwaukee II Court concluded that the problem of interstate sewage of which Illinois complained "has been thoroughly addressed through the administrative scheme

established by Congress” and thus federal common law had been displaced. *Id.* at 320.<sup>5</sup>

The Clean Air Act is fundamentally different from the post-1972 FWCPA. EPA has set no regulations defining what levels of greenhouse gas emissions – from power plants or any other source – are legal or illegal. And, unlike the text of the post-1972 FWCPA, which made all discharges without a permit illegal, the text of the Clean Air Act itself does not provide an answer, in the absence of implementing regulations. The current administration has announced no plans to take action that would affect power plants under Section 111. The existence of NAAQS is a prerequisite for the Act’s provisions that allow State challenges to emissions in other States, and there are no plans to issue NAAQS for greenhouse gases – a process that takes several years once commenced. In sum, the Clean Air Act, standing alone without applicable regulations, does not actually address any of the questions raised by this action. All that the Act does is delegate power to EPA, power which might, theoretically, someday be used to promulgate regulations addressing some of the questions raised here.

**E. Further precedent confirms that federal legislation conferring broad powers on an agency, standing alone, is not sufficient to displace federal common law where that power is unexercised.**

As Milwaukee I and Milwaukee II illustrate, for a statute and implementing regulations to displace the federal common law, either the statute itself must actually decide the issue that federal common law otherwise would decide or implementing regulations that do so must be in place. Statutes creating latent but unexercised regulatory power – or even resulting in exercised but incomplete regulatory power – do not suffice. A comparison among interstate water allocation cases<sup>6</sup> – on the one hand, Texas v. New Mexico, 462 U.S. 554, and Nebraska v. Wyoming, 325 U.S. 589 (1945), and, on the other hand, Arizona v. California, 373 U.S. 546

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<sup>5</sup> In Mattoon v. City of Pittsfield, 980 F.2d 1 (1<sup>st</sup> Cir 1992), a case involving private party plaintiffs, the First Circuit summarily concluded that the Safe Drinking Water Act (“SDWA”) displaced a federal common law claim for a non-interstate release of a pathogen not among the many specifically listed in the regulations. While the opinion contains no statutory or regulatory analysis, the case is utterly unlike this one because the SDWA and its regulations form a very detailed, existing body of law that applies to a very focused problem – the quality of drinking water – and that very problem was the subject matter of the plaintiff’s complaint. The Clean Air Act, in the context of greenhouse gas emissions, is in contrast a mere framework for dealing with the general problem of airborne harms, with only the future and unrealized potential of regulation, and does not in any way address the problem identified by Plaintiff-States.

<sup>6</sup> Interstate water allocation cases, along with boundary and interstate nuisance disputes, are traditionally subject to “interstate common law.” Arkansas v. Oklahoma, 503 U.S. 91, 98-99 (1992). The Supreme Court applies analogous principles in these areas. *See, e.g., Nebraska v. Wyoming*, 515 U.S. 1, 15 ((1995) (water allocation case, relying on Missouri v. Illinois, 200 U.S. 496 (1906), an interstate nuisance case).

Catherine O'Hagan Wolfe  
July 6, 2007  
Page 9

(1963) – confirms that displacement will not be found in latent but unexercised agency power, pursuant to general Congressional delegation.

In Texas v. New Mexico, Congress had approved an interstate compact dealing with allocation of the Pecos River, thereby transforming the compact into federal law. 462 U.S. at 564. The compact created a commission to make findings of fact related to available water and existing water uses and administer standards of allocation. Following a “paralyzing impasse[]” on the commission, id. at 565, Texas sought relief in the Supreme Court. New Mexico argued that, given Congress’ approval of the compact, the Supreme Court had no authority to grant Texas relief under the federal common law. Instead, it argued, the judiciary’s role was limited to review of the decisions of the commission, pursuant to the deferential standards for review of agency action. Id. at 566-67. The Supreme Court disagreed, concluding that “[o]ur equitable power to apportion interstate streams and the power of the States and Congress acting in concert to accomplish the same result are to a large extent complementary.” Id. at 569.

Similarly, in Nebraska v. Wyoming, much of the water at issue was stored behind federal dams and in other federal projects, under federal statutes “the Secretary [of the Interior] had broad powers to make contracts governing the use and disposition of the stored water,” and thus Congress had granted a federal agency authority to control the flow of the water. See Arizona v. California, 373 U.S. at 629 (Douglas, J., dissenting) (discussing statutes in place at the time of the Nebraska v. Wyoming case). Rather than deferring to these agencies, the Court applied the federal common law in determining the States’ respective rights, declining to conclude that Congress intended to displace the States’ right to a remedy under the federal common law. 325 U.S. at 599-600.

In Arizona v. California, in contrast, the Court found that Congress, in enacting the Boulder Canyon Project Act (“Project Act”), “intended to and did create its own comprehensive scheme for the apportionment” of the waters of the Colorado River. 373 U.S. at 564-65. It concluded that the Project Act displaced federal common law because it provided a “complete statutory apportionment intended to put an end to the long-standing dispute over Colorado River waters.” Id. at 560. As in the Nebraska v. Wyoming case, a Congressional delegation of power to the Secretary of the Interior to make decisions about the storage and release of waters of the River stored behind federal dams effectively gave the Secretary the power to control the flow of the interstate waters at issue. Id. at 579. The Court did not find this bare delegation of power to control flow sufficient to displace the federal common law. Instead, the Court emphasized that Congress in the Project Act had decided on a particular division that it believed was fair, defining the exact allocation, in acre-feet of water, that each State should receive. Id. at 565. Furthermore, it provided that a party must enter into a contract with the Secretary to obtain rights to water stored behind federal dams. Id. at 580. And, while Congress had authorized the States to negotiate a different allocation than the one Congress ratified, at the same time it expressly provided that any new, negotiated allocation would be subject to any claims under contracts into which the Secretary already had entered. Id.

In short, in Arizona v. California, the Court concluded that Congress had “addressed the

Catherine O'Hagan Wolfe  
July 6, 2007  
Page 10

question" that federal common law otherwise would have resolved, Milwaukee II, 451 U.S. at 314 (discussing Arizona v. California), thus displacing the common law. In Texas v. New Mexico and Nebraska v. Wyoming, in contrast, the Court declined to find displacement by Congress' delegation to an agency of allocation power. The difference is that, in the latter, Congress had merely created a latent, but unexercised, power to address issues ordinarily governed by federal common law; in the former, Congress actually addressed the relevant issues.

Thus, unless and until EPA actually regulates greenhouse gas emissions, the Clean Air Act's general grants of authority to do so will not resolve the States' claims and thus do not displace federal common law, any more than the various federal statutory delegations of authority on the books at the time of Milwaukee I, Texas v. New Mexico, or Nebraska v. Wyoming displaced federal common law.

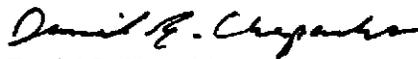
### **Conclusion**

The Supreme Court has now made clear that EPA has the authority under the Clean Air Act to adopt regulations related to greenhouse gas emissions – that there is the potential for regulations addressing global warming at some point in the future. For the Plaintiff-States, however, nothing has changed. Under the Clean Air Act, Plaintiffs have no remedy for injuries from greenhouse gases today, just as they did not have such a remedy under the Act the day before the Massachusetts decision. We return, therefore, to Justice Holmes' statement in Tennessee Copper:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the acts of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

206 U.S. at 238. Like Georgia in 1907, the Plaintiff-States in 2007 are entitled to a federal forum to present their federal interstate claims. In these circumstances, Congress's bare grant of broad authority under the Clean Air Act, and a mere hope for future comprehensive federal regulation, cannot preclude their recourse to the Judicial branch and the federal common law.

Sincerely,



Daniel J. Chepaitis  
Assistant Solicitor General

Enc.

cc: Shawn Patrick Regan (by email)  
Matt Pawa (by email)